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Top Questions You Should Ask Before Choosing a Mediator

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Selecting a mediator is a very important part of your mediation strategy. To find the right mediator for your case, it is important to determine the kind of mediation you want to have and search for the mediator most likely to provide the right fit. To determine fit, here are some questions to help. These questions can serve as a road map for a conversation with a prospective mediator for your case. You can also use these to help you think about how to identify the right mediator, even if you choose not to have vetting conversations.

Subject Matter Expertise

Have you mediated cases like this before? If not, did you work on these kinds of cases before you were a mediator? If so, how many and how long ago? Please describe one of those cases.

The goal here is to discover if the mediator can speak to the merits of a case in a way that is effective and credible. If, for example, you are looking for someone to handle a large property damage coverage dispute against a tower of insurers, it is helpful to know if that person has experience

with all of the complex dynamics involved in a case where multiple carriers may have similar or identical policy language but subtly different positions.

Prior Engagements

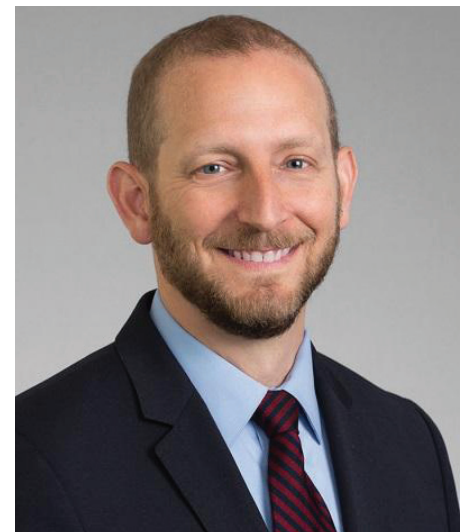
Have you worked with the lawyers or parties before? If so, when? Is there anything I should know about your relationship with the other lawyer or party?

Often, a mediator may have worked with or even socialized with someone in the case before. There is no inherent bar on a mediator who has interacted with participants in the past. Those relationships can be helpful and enhance the mediator's credibility.

General Style

Do the merits of a case matter in your mediations? If so, how? Do you believe you are facilitative or evaluative, or a mix of both?

Mediators talk about facilitative and evaluative styles, although these are just descriptive terms for both ends of a spectrum of styles. Facilitative mediation is more focused on creating a safe environment for a discussion and



helping the parties to have that discussion. An evaluative style might involve a mediator who gets deeply involved in the merits of a case and asks probing questions or even expresses an opinion about the strengths of certain issues. Think about which end of the spectrum you might prefer.

Pre-Mediation Calls

Do you offer pre-mediation calls? If so, are they for outside counsel only, or can clients, including in-house counsel, participate? Do you have just one call for all parties, or do you have separate calls? Is there flexibility when the situation requires?

Pre-mediation calls are very effective in making sure all parties to a mediation are coming to the same conversation. The calls can reveal information asymmetries best addressed before the mediation session, clarify any expectations coming into the mediation and verify who will be present and who will have authority. Some mediators offer flexible pre-mediation calls that can be customized to your case. Some offer only preset options, and some do not offer pre-session calls at all.

Mediator Preparation and Mediation Submissions

Do you like to receive and review written submissions in advance of a mediation? If so, how far in advance? Do you prefer that the parties exchange their submissions or give them to you confidentially, or shared but with an option for a confidential supplement? How much time will be spent reviewing the submissions and preparing for a full-day mediation?

The submissions provide an opportunity for each party to arm the mediator with the principal talking points that will form the basis of the conversation at the mediation. Many mediators, myself included, feel it is best to share submissions with the other side. Often, this can include an opportunity for a confidential supplement. It is usually best to advance the full range of issues so that the mediator can then move the conversation forward from there.

Joint Sessions

Do you begin your mediations with a joint session? If so, do these joint sessions include statements from each side, or are they limited to introductions and a discussion of rules and process? If there are statements from each side, what constraints are placed on presenters?

A mediation usually proceeds through a combination of separate caucuses and joint meetings. These can be structured in any order. Joint sessions can be a high-risk, high-reward technique, so it helps to know how your mediator deals with such situations.

Brackets/Conditional Offers

Are you comfortable with brackets? In what situations do you find them effective?

Brackets, also known as conditional offers, can be a useful way to convey and receive more information than a single offer or demand can convey. For example, if the demand is \$5 million and the offer is \$500,000, and a party moves to \$4.9 million, that conveys very limited information. If, however, a party says it will move from \$5 million to \$3 million if and only if the defendant were to offer \$2 million, that conveys a lot more information and can be an effective way to break an impasse and/or generate significant movement.

Mediator's Proposals

Do you use mediator's proposals? If so, under what circumstances?

Will you issue a proposal even if a party does not want to receive one?

You should always know a mediator's approach to mediator's proposals. Some mediators always use mediator's proposals. Some introduce them early in a case. Some won't offer them without permission from both sides. It helps to know the usual practice when you are formulating your mediation strategy.

Conclusion

When choosing a mediator, think about the kind of mediation you want to have. Then consider the kind of mediator who will have the appropriate background and experience, but who will also provide the kind of process and technique that will help ensure you have a mediation that works for you.

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